

No. 84-755

Supreme Court, U.S.

FILED

*Not.*

~~APR~~

28 1985

ALEXANDER L. STEVAS

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

*Petitioner,*

v.

ROSA ELVIRA MONTOKA DE HERNANDEZ,

*Respondent.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Ninth Circuit

**BRIEF FOR RESPONDENT**

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**QUESTION PRESENTED FOR REVIEW**

Whether respondent, who was suspected of attempting to smuggle contraband drugs carried within her body and who refused to submit to an x-ray, could lawfully be detained at the border by customs officers for the period of time necessary to examine her bodily wastes.

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### STATEMENT OF THE CASE

Shortly after midnight on March 5, 1983, Rosa Elvira Montoya de Hernandez arrived at the Los Angeles International Airport on a flight from Bogota, Colombia. After deplaning, Ms. de Hernandez proceeded to an immigration checkpoint where her travel documents were inspected. J.A. 7-8. Her passport and visa were found to be in order, and both Ms. de Hernandez' passport and the Immigration I-94 Form were stamped "admitted." J.A. 8. Having been cleared through immigration, Ms. de Hernandez then proceeded to the customs area. J.A. 7.

Customs officials reviewed her travel documents and directed Ms. de Hernandez to a secondary inspection area for a more thorough examination. There, United States Customs Inspector Jose Serrato inspected Ms. de Hernandez' passport, visa and airline tickets, and questioned her about her trip to the United States. J.A. 46. Her travel documents were found to be in order. She was traveling on a valid Colombian passport. J.A. 8. Inspector Serrato noticed that Ms. de Hernandez' passport reflected at least eight previous trips to the United States. J.A. 46. Inspector Serrato asked Ms. de Hernandez about the following topics:

1. The purpose of her trip.
2. How long will she stay.
3. Did she have any agricultural products.
4. Did she have \$5000 in any currency. J.A. 46.

Ms. de Hernandez, who spoke no English, told Inspector Serrato that she was coming to the United States on a short business trip to buy merchandise, including clothing and small appliances, for her husband's store in Colombia, J.A. 14, and that she had approximately \$5000 in cash with which to make her purchases. J.A. 57; E.R. 40. Ms. de Hernandez also showed Inspector Serrato a book of invoices<sup>1</sup> containing re-

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<sup>1</sup> Exhibit 102, introduced into evidence at the suppression hearing in the district court, is a part of the trial record to which respondent wishes to

ceipts with her name on them, showing past buying trips at retail outlets on previous occasions when she was in this country. J.A. 15. Inspector Serrato examined the portfolio of invoices and receipts. J.A. 15; E.R. 40. Ms. de Hernandez then showed Inspector Serrato a business card from her husband's business in Colombia. J.A. 15-16.

In response to Inspector Serrato's further questions, Ms. de Hernandez told him that she would visit the stores in which she wished to make purchases by taxi, that she had no family or friends in the United States, and that although she had no confirmed reservations, her intention was to stay at the Holiday Inn. J.A. 41, 62; E.R. 40.

Inspector Serrato next examined Ms. de Hernandez' luggage and purse and noted the following:

Ms. de Hernandez' purse, at the time that she came into Customs, contained the following: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, eye shadow; a purse containing perfume, hand cream, toothbrush, toothpaste, hairbrush, handkerchief, pictures of two children, a pen, and some U.S. currency;

A suitcase containing nightgown, a 500-peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted bras, panties and socks, two sweaters, and a brown skirt. J.A. 9.<sup>2</sup>

direct the Court's particular attention. Because Exhibit 102 was not deemed suitable for photocopying, it was not made part of the Joint Appendix. Instead, the Clerk of this Court has obtained Exhibit 102 from the exhibits clerk in the district court, and it is available in the Clerk's Office.

<sup>2</sup> Inspector Serrato's sworn declaration, deemed his testimony on direct at the suppression hearing (J.A. 5-6), contained the statement that, when he examined Ms. de Hernandez' luggage, he noticed "no toiletries." J.A. 46. At the suppression hearing in the district court, this was shown to be false. J.A. 9, 31.

With respect to Serrato's conclusion that Ms. de Hernandez had "little clothing," J.A. 46, *compare*, *United States v. Padilla*, 729 F.2d 1367 (11th Cir. 1984) ("a few pairs of dungarees, a couple of t-shirts, and very little [sic] toiletries," which was "considered unusual for a visit of ten days.") 729 F.2d at 1368.

Inspector Serrato noticed that Ms. de Hernandez had with her only one pair of shoes, which she wore, and that she had no billfold. J.A. 46, 62.

After summoning another customs inspector to seek his advice, Inspector Serrato formed the opinion, based upon Ms. de Hernandez' responses and general demeanor, that she fit the profile of persons suspected of carrying drugs concealed in their bodies. J.A. 62.

Inspector Serrato thereupon directed that Ms. de Hernandez be taken to a search area for a pat-down search by a female customs inspector. J.A. 46, 57. This "pat-down" became a strip search. J.A. 57. The strip search failed to produce any evidence to support Inspector Serrato's suspicions. J.A. 16-17, 27. During the course of the strip search, the female customs inspector observed that Ms. de Hernandez was wearing two pairs of elastic type panties. When Ms. de Hernandez pulled these down she exposed "a paper towel placed in the crotch area to absorb what seemed to be a vaginal discharge." J.A. 57.

After the strip search, Serrato brought all the information he had at that time to the attention of his supervisors and asked them for permission to ask Ms. de Hernandez to consent to an x-ray search. J.A. 46. Serrato received the approval of his supervisors and "I asked passenger de Hernandez if she would consent to an x-ray of her abdomen area, and she stated 'yes.'" J.A. 47. Serrato next asked her if she was pregnant. Ms. de Hernandez responded that she believed she was. J.A. 47. "I asked her how long and if she was sure, and she stated 'about one month. I just saw the doctor before my trip here.'" J.A. 47.

Serrato advised his supervisors of this information and it was determined that possibly the doctors at the hospital could assist in determining if indeed she was pregnant. E.R. 40. Inspector Serrato then returned to Ms. de Hernandez and asked her if she would consent to a doctor's examination to verify her pregnancy. Ms. de Hernandez agreed to do so. J.A. 47.

As they prepared to depart for the hospital, Inspector Serrato informed Ms. de Hernandez that regulations required that she be placed in handcuffs and that her pant legs be taped closed in order to be transported to the hospital. At this point, Ms. de Hernandez became agitated and upset and withdrew her consent for an x-ray examination. J.A. 47, 63; E.R. 40.

After Ms. de Hernandez withdrew her consent for an x-ray examination, she requested permission to place a telephone call to her husband. This request was refused. J.A. 47.

Inspector Serrato then informed his supervisors that "she had refused consent because we had to handcuff her." J.A. 47. The supervisors called the customs duty agent (Agent Windes) "so we could obtain a court order." J.A. 47; E.R. 40.

At about 1:30 a.m. on March 5, 1983, Agent Windes, the duty agent, received a telephone call from a customs supervisor, who requested that he (Windes) obtain a court order for an x-ray search of Ms. de Hernandez. J.A. 39. During this conversation, the customs supervisor related to Agent Windes that Ms. de Hernandez met the profile developed for "balloon swallows" and was believed to be a narcotics courier. J.A. 39. Windes decided that the facts then known probably would not support a court-ordered x-ray examination. Pet. App. 3a.<sup>3</sup>

While the customs supervisors were requesting that Agent Windes seek to obtain a court order, Ms. de Hernandez again asked to be allowed to call her husband. Inspector Serrato again denied her request. Ms. de Hernandez then asked if Inspector Serrato would call her husband in order to verify the information she had provided. She offered to give the inspector

<sup>3</sup> This conclusion by the Ninth Circuit Court of Appeals is supported by logic and common sense based upon what later transpired. Fifteen and one-half hours later, after important incriminating evidence had been developed over the course of a lengthy involuntary confinement, the same Agent Windes, using incriminating information gathered during the period of detention, did begin making efforts to apply for a court-ordered x-ray examination, notwithstanding the fact that Ms. de Hernandez still refused to consent to such an examination. J.A. 41-42.

the telephone number to do so. Inspector Serrato did not call her husband. J.A. 18, 47.

After Agent Windes declined to seek a court order, he instructed the customs supervisors that if Ms. de Hernandez would not cooperate, to "deport" her. J.A. 28, 58. The customs supervisors returned from their conversation with Agent Windes to advise Agent Serrato that Windes had declined to seek a court order. Agent Serrato was instructed to detain Ms. de Hernandez in customs' custody and to deport her on the next available flight back to Colombia, which was two days away.<sup>4</sup> J.A. 19, 48; E.R. 40.

Agent Serrato then returned to Ms. de Hernandez and informed her that the customs agents were "unable to obtain a court order from the Magistrate" and that they had been "instructed by Agent Windes to hold her until Monday and deport her on the next Avianca flight." J.A. 18, 48.

Inspector Serrato then informed Ms. de Hernandez that the customs agents would remain with her "until Monday until we deport her." He also told her that "if while she is in our custody, if she discharges anything illegal internally, she will be placed

<sup>4</sup> Petitioner states that Ms. de Hernandez was "afforded the option[ ]" of "returning to Colombia on the next available flight . . ." and that "[g]iven these choices, respondent opted to return to Colombia." Br. for Pet. 5. Petitioner's recitation is supported to some extent by the opinion of the court of appeals below. Pet. App. 3a. The contention that Ms. de Hernandez was given a choice of returning to Colombia on the next available flight, and that she voluntarily opted for that choice, is unsupported by the record below. If this were true, Ms. de Hernandez could be said to have consented to any period of detention reasonably incident to attempts to repatriate her, and by implication to the lesser period of detention involved here. Although petitioner does not argue in his brief that Ms. de Hernandez consented to be detained pending the next available flight back to Colombia, respondent believes that the facts in the record pertaining to this particular issue should be clarified so that unnecessary time is not wasted on this point at oral argument. The trial judge addressed this issue at the conclusion of the testimony at the suppression hearing. J.A. 37.

under arrest and transported to a jail ward and be unable to leave the United States." J.A. 48.

At about 1:30 a.m. (while the supervisors were speaking with Windes), Inspector Serrato and a female customs inspector took Ms. de Hernandez to a manifest room. Ms. de Hernandez was held in custody in the manifest room until 8:30 a.m., March 5, 1983, a period of seven hours. J.A. 20. The manifest room had a hard, uncarpeted floor, and did not have a bed or a couch, but only typical office chairs with slightly curved backs. J.A. 20, 25.

Present in the manifest room with Ms. de Hernandez were Agent Serrato and two female customs inspectors. J.A. 48, 64. The three custom inspectors sat observing Ms. de Hernandez until 8:30 the next morning. At no time did they sleep or lose sight of Ms. de Hernandez. J.A. 48. Ms. de Hernandez "sat in her chair clutching her purse" for the entire time. J.A. 20, 48; E.R. 40. She was not free to leave. J.A. 19. Ms. de Hernandez was informed by Agent Serrato that should she desire to use the restroom during the course of her detention, she would be accompanied to the restroom by two female customs inspectors and would be required to excrete into a waste basket under their observation. J.A. 28-29, 58.

Surveillance of Ms. de Hernandez continued throughout the next day. J.A. 64. At about 3:00 p.m., Ms. de Hernandez was strip searched a second time. ("This was to insure the safety of the surveilling officers.") J.A. 64. Again, no contraband or evidence of wrongdoing was found. J.A. 26, 50.

At approximately 4:00 p.m., March 5, 1983, Agent Windes arrived at the area where Ms. de Hernandez was being involuntarily confined. After being briefed, Agent Windes decided to begin efforts to seek a court order for an x-ray examination. J.A. 64. In preparing the affidavit in support of a request for a court order, Agent Windes relied on facts elicited during the previous sixteen hours of involuntary confinement, namely, that Ms. de Hernandez had refused food and drink over a sixteen hour period, that she had been sitting curled up

in a chair, leaning to one side, and that she refused to use the restroom over that period of time. J.A. 41-43, 64.

Until approximately 4:00 p.m. on March 5, 1983, Agent Windes took no affirmative steps to obtain a court order for an x-ray examination of Ms. de Hernandez. J.A. 23, 40, 64.

The preparation of Windes' affidavit and application for a court order took from approximately 4:00 p.m. until 12:00 midnight. At midnight a magistrate was contacted and a court order for an x-ray and body cavity search issued. J.A. 40, 44-45.

Ms. de Hernandez was then transported, in custody, to the Los Angeles Medical Center for a body cavity and x-ray search. J.A. 64. At the hospital, after a urinalysis was taken for purposes of a pregnancy test, but before its results were known, a vaginal and rectal body cavity search was performed by the doctor. At 3:00 a.m., during the course of the rectal search, the doctor located a balloon-shaped object in Ms. de Hernandez' rectum. J.A. 51.

At approximately 3:15 a.m., March 6, 1983, almost 27 hours after her initial detention, Ms. de Hernandez was formally placed under arrest and advised of her *Miranda* rights. J.A. 51. During the next hour Ms. de Hernandez expelled six more balloons from her rectum, all of which were determined to contain cocaine. J.A. 51. Over the next four days, Ms. de Hernandez excreted a total of 88 balloons containing cocaine. J.A. 65.

Ms. de Hernandez was detained in custody at the medical center until March 10, 1983 when she was transported to Sybil Brand Institute for Women. Ms. de Hernandez did not make her initial appearance before a United States Magistrate until March 11, 1983, one week after her initial detention had begun. J.A. 65.

## SUMMARY OF ARGUMENT

Routine searches by customs officers at the border are justified as an act of national sovereignty and may be conducted with or without cause. As an investigation focuses on one particular traveler who is singled out for a more intrusive search, however, Fourth Amendment concerns are implicated, and the government has the burden of showing that the more intrusive search or seizure was reasonable under the circumstances. *Florida v. Royer*, 460 U.S. 491, 500 (1983)

The circuit courts of appeal have developed a consistent body of law applying the "reasonableness" requirement of the Fourth Amendment to the more intrusive border searches. The approach taken by the circuit courts of appeal weighs the special needs of law enforcement officers at the border against the Fourth Amendment rights of the individual.

The circuits have established a "hierarchy of intrusiveness" for these searches, and a "flexible test" which adjusts the strength of suspicion necessary for a particular search to the intrusiveness of the invasion of an individual's privacy and dignity in that particular case. *United States v. Sandler*, (5th Cir.), *infra* at 1166; *United States v. Vega-Barvo*, (11th Cir.), *infra* at 1344. Thus, the amount of articulable suspicion sufficient to justify a particular search may not suffice to justify a more intrusive or demeaning search. *United States v. Afanador*, (5th Cir.), *infra* at 1328.

The lengthy detention in this case exceeded the intrusiveness of a full-scale custodial arrest. As a result, Ms. de Hernandez suffered an invasion of Constitutionally protected privacy and dignity of major proportion. The amount of suspicion possessed by the customs officers, on the other hand, was insufficient to justify the treatment Ms. de Hernandez received under any standard of reasonableness.

Petitioner contends that once the customs agents developed a suspicion that Ms. de Hernandez was internally smuggling narcotics, they were entitled to detain her as long as was necessary to confirm or dispel their suspicions. Br. for Pet.

20-21. Petitioner's argument fails to consider that seizures of persons valid at their inception may become unreasonable because of the length or circumstances of the subsequent detention. *United States v. Place*, *infra*. Moreover, lengthy police detentions "for purposes of investigation" are the hallmark of a police state, not a free society, and have been repeatedly condemned by this Court. *Dunaway v. New York*, *infra*; *Davis v. Mississippi*, *infra*; *Hayes v. Florida*, *infra*.

## ARGUMENT

### I. HISTORICAL AND LEGAL BACKGROUND

This case presents for resolution the following question:

What balance is to be struck when the sovereign's interest in preventing the introduction of contraband at its border collides with the individual's right to be free of unreasonable searches and seizures?

Although this Court has never ruled on whether the Fourth Amendment<sup>5</sup> to the United States Constitution applies to border searches, it has on two occasions assumed that the "reasonableness" guarantee of the Fourth Amendment is applicable to searches and seizures at the border.<sup>6</sup>

In *United States v. Ramsey*, 431 U.S. 606 (1977), this Court, in *dicta*, interpreted the "border search exception" to mean that border searches are "excepted" only from the warrant and probable cause requirements of the Fourth Amendment, but not from the Fourth Amendment's more general proscription of unreasonable searches and seizures.<sup>7</sup> Although 19 U.S.C. Sections 482 and 1582<sup>8</sup> appear to statutorily authorize a plena-

<sup>5</sup> App. 1a, *infra*.

<sup>6</sup> *United States v. Ramsey*, 431 U.S. 606, 622 (1977); *United States v. Villamonte-Marquez*, \_\_\_ U.S. \_\_\_ (1983), 33 Crim.L.Rep. (BNA) 3173, 3177.

<sup>7</sup> *Ramsey*, 431 U.S. at 615-619, 621-622.

<sup>8</sup> App. 1a-2a, *infra*.

ry customs power to seize and search individuals entering the country without respect to the reasonableness of the search, no Act of Congress can authorize a violation of the Constitution.<sup>9</sup>

Under what circumstances a border search would be deemed "unreasonable" has never been addressed by this Court.<sup>10</sup> The circuit courts of appeal have addressed that very issue, however, and over the last 28 years<sup>11</sup> have developed an extensive and essentially consistent body of law which applies the Fourth Amendment's "reasonableness" standard to border searches.

The legal principles which have evolved are as follows: routine border searches are *per se* reasonable even when based upon "mere suspicion," "unsupported suspicion," or a subjective hunch.<sup>12</sup> An individual's decision to cross our national border is justification enough for the search. Such searches are deemed reasonable simply by virtue of the fact that they occur at the border.<sup>13</sup> No articulable suspicion is required to justify such a search.<sup>14</sup>

The circuit courts of appeal have concluded that a "routine" border search includes the following matter-of-course incursions on an individual's liberty and privacy: the traveler may be stopped and asked to identify himself. His passport,

<sup>9</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975); *Ramsey*, 431 U.S. at 615.

<sup>10</sup> See, e.g., *Ramsey* at 618 n.13.

<sup>11</sup> *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958); *United States v. Willis*, 85 F.Supp. 745 (S.D. Cal. 1949). During this period of time, the Court denied certiorari in every case in which a petition was filed.

<sup>12</sup> *United States v. Sandler*, 644 F.2d 1163, 1166 (5th Cir. 1981) (*en banc*); *Cervantes v. United States*, 263 F.2d 800, 803, n.5 (9th Cir. 1959).

<sup>13</sup> *United States v. Carter*, 592 F.2d 402, 404 (7th Cir.), cert. denied, 441 U.S. 908 (1979).

<sup>14</sup> *United States v. Himmelwright*, 551 F.2d 991, 993-94 (5th Cir.), cert. denied, 434 U.S. 902 (1977); *Carroll v. United States*, 357 U.S. 132, 153-154 (1955); See also *Almeida-Sanchez*, 413 U.S. at 272.

visa and entry documents may be examined. He may be questioned briefly concerning the purpose of his trip and his estimated length of stay. His luggage may be searched. He may be asked to empty his pockets, to remove outer garments such as a hat, a coat or shoes, and he may be patted down or frisked. An individual may also be required to produce for inspection such personal effects as the contents of his or her pockets, a purse or a wallet.<sup>15</sup>

Such a detention and search is "routine" because its intrusiveness on the personal privacy and dignity of the individual is minimal. Although routine customs inspections can be irksome to the impatient traveler, they do not subject the individual to embarrassment, indignity, humiliation or fright. All travelers are subject to the same inconvenience and may be said to suffer in common.<sup>16</sup> To some extent all travelers may be said to be "on notice" of such routine procedures and may be said to have given implied consent to some inconvenience as a condition of international travel. As a result, international travelers may have a reduced expectation of privacy because of the notoriety of routine customs procedures.<sup>17</sup>

Prolonged detentions, strip searches and body cavity searches are not routine, and involve a greater invasion of an individual's personal privacy. "As [the] intrusiveness [of the search] increases, the amount of suspicion necessary to justify the search correspondingly increases." *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir.), cert. denied, \_\_\_ U.S. \_\_\_ (1984), 36 Crim.L.Rep. (BNA) 4133; *United States v. Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983); *United States v. Quintero-Castro*, 705 F.2d 1099, 1100 (9th Cir. 1983).

<sup>15</sup> See *Sandler*, 644 F.2d 1163, and the cases from other circuits collected therein.

<sup>16</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-559 (1976).

<sup>17</sup> *United States v. King*, 517 F.2d 350, 353 (5th Cir. 1975).

Strip searches, where the traveler is asked to remove undergarments and perhaps disrobe altogether, have generally been held to be justified only by "reasonable suspicion" that the traveler is engaged in wrongdoing. Although a lesser standard than probable cause,<sup>18</sup> reasonable suspicion requires that the customs agent have a particularized, articulable suspicion that the traveler is engaged in illegal activity. More than a generalized subjective suspicion or "hunch" is necessary. The officer must be able to point to objective facts indicating criminal behavior.<sup>19</sup>

Body cavity searches, which involve a probing beyond the surface and into body orifices, typically the rectum or the vagina, are without exception considered to be more intrusive than strip searches, and correspondingly require a higher level of suspicion to justify their initiation.<sup>20</sup> Body cavity searches would also include searches of the contents of the stomach where an individual is forced to drink an emetic which produces immediate vomiting.<sup>21</sup>

<sup>18</sup> Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

<sup>19</sup> *United States v. Stornini*, 443 F.2d 833, 834 (1st Cir.), cert. denied, 404 U.S. 861 (1971); *United States v. Asbury*, 586 F.2d 973, 975-76 (2nd Cir. 1978); *United States v. Diaz*, 503 F.2d 1025, 1026-27 (3rd Cir. 1974); *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970).

<sup>20</sup> *Vega-Barvo*, 729 F.2d at 1344-45; *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984); *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980).

<sup>21</sup> This is commonly referred to as "stomach pumping." See *Blefare v. United States*, 362 F.2d 870, 872, 881 n. 2 (9th Cir. 1966); *United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976); *King v. United States*, 258 F.2d 754 (5th Cir. 1958), cert. denied, 359 U.S. 939 (1959); *United States v. Briones*, 423 F.2d 742 (5th Cir. 1970), cert. denied, 399 U.S. 933 (1970); *Barrera v. United States*, 276 F.2d 654 (5th Cir. 1960); *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963), cert. denied, 377 U.S. 936 (1964); See also *Rochin v. California*, 342 U.S. 165 (1952).

The Ninth Circuit Court of Appeals requires a "clear indication" or "plain suggestion" to justify a search of an individual's body cavities at the border.<sup>22</sup> The Ninth Circuit's test is taken from this Court's opinion in *Schmerber v. California*, 384 U.S. 757 (1966), where the Court stated, in deciding that a sample of blood could be taken from a non-consenting individual who had been arrested for drunk driving:

Whatever the validity of [routine searches incident to a valid arrest] they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

*Id.* at 769.

As the Ninth Circuit has defined "clear indication," it is a level of suspicion higher than the "reasonable suspicion" necessary to justify a strip search, but something less than probable cause justifying an arrest.<sup>23</sup>

Although "clear indication" has not been employed as a form of words outside the Ninth Circuit, other circuits, including the Fifth and Eleventh Circuits, agree that body cavity searches are more intrusive than strip searches and that a higher level of suspicion is required to justify a body cavity search than would be required for a strip search.<sup>24</sup> The Fifth and Eleventh Cir-

<sup>22</sup> *Rivas v. United States*, 368 F.2d 703, 710 (9th Cir. 1966).

<sup>23</sup> *United States v. Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983).

<sup>24</sup> *Sandler*, 644 F.2d at 1167-68; *Vega-Barvo*, 729 F.2d at 1344 ("Fifth Circuit cases prior to Oct. 1, 1981 . . . together with Eleventh Circuit cases, establish a hierarchy of intrusiveness of [border] searches."); *Mejia*, 720 F.2d at 1382; *United States v. Sanders*, 663 F.2d 1 (2nd Cir. 1981).

cuits use reasonable suspicion as a "flexible standard"<sup>25</sup> which adjusts the strength of suspicion necessary for a particular search to the intrusiveness of the invasion in a particular case. While "reasonable suspicion" will justify a strip search, more "reasonable suspicion" is necessary for a body cavity search.<sup>26</sup>

'the greater the intrusion, the greater must be the reason for conducting a search that results in such invasion.' . . . Thus, what constitutes 'reasonable suspicion' to justify a particular search may not suffice to justify a more intrusive or demeaning search.

*United States v. Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978) (citations omitted), quoted with approval in *Sandler*, 644 F.2d at 1166.

Although the Ninth, Fifth and Eleventh Circuits are not using the same labels, they are speaking the same language, they are operating under the same assumptions, they are applying the same principles and they are achieving the same results.<sup>27</sup>

Petitioner states:

the 'clear indication' threshold imposed by [the Ninth Circuit] for detaining suspected alimentary canal smugglers

<sup>25</sup> *Sandler*, 644 F.2d at 1166; *Vega-Barvo*, 729 F.2d at 1344.

<sup>26</sup> *Id.* at 1351 (dissenting opinion, characterizing majority opinion).

<sup>27</sup> In *Briones*, 423 F.2d 742, the most recent Fifth Circuit case involving an internal body search at the border, for example, a stomach pumping by administration of an emetic was sustained where a confidential informer who had proved reliable in the past informed customs that Briones would attempt to smuggle heroin into the United States. The customs agent had personal knowledge that Briones was a heroin addict. Briones and a companion attempted to enter the United States when and where the informer predicted. In upholding the administration of the emetic, the court, noting that the Ninth Circuit required a "clear indication," explicitly declined to specify what standard was applicable, merely noting that "the search . . . was reasonable under either standard." *Id.* at 744;

See also *Vega-Barvo*, 729 F.2d at 1345 (approving the result reached in *Briones* based upon "the greater quantum of suspicion provided by the informant's tip.")

. . . is impractical. . . . [A]limentary canal smuggling does not ordinarily leave . . . readily observable external signs. See *United States v. Mendez-Jimenez*, 709 F.2d at 1303. Consequently, imposition of the higher 'clear indication' standard would, as in this case, almost invariably require the release into this country of persons believed to be engaged in alimentary canal smuggling. . . .

Pet. 16 n.16; Br. for Pet. 31-34.

This statement is not supported by the facts. First of all, not even the reasonable suspicion standard would have prevented Rosa Elvira Montoya de Hernandez from being "released into this country." As respondent points out, (pages 39-43, *infra.*), the objective, articulable and particularized facts known to the customs officers would not have supported her continued detention under the standard currently employed in any circuit.

Secondly, *Mendez-Jimenez*,<sup>28</sup> the case petitioner relies on in support of his statement, strongly supports the opposite conclusion. In *Mendez-Jimenez*, objective and articulable facts showed a "clear indication" of alimentary canal smuggling. An affidavit containing those facts was presented to a magistrate. The magistrate issued a court order authorizing an x-ray examination of the suspect. The x-rays revealed foreign objects. The suspect was detained until he passed balloons containing cocaine. The conviction was sustained on appeal by the Ninth Circuit. The language from *Mendez-Jimenez* referred to by petitioner, viz., ". . . it should be noted that smuggling by ingestion into the alimentary canal does not leave the external signs that body cavity (e.g., rectum or vagina) smuggling does," *Id.* at 1303, Br. for Pet. 32, was used by the Ninth Circuit only in the context of pointing out that in evaluating whether the facts establish a "clear indication," the court should take into account what factors experienced customs officers have considered to be indicative of such smuggling. *Id.*

<sup>28</sup> *Mendez-Jimenez*, 709 F.2d 1300.

at 1302-03.<sup>29</sup> *Mendez-Jimenez* is not atypical of Ninth Circuit jurisprudence in this area.<sup>30</sup>

## II. THE DETENTION OF MS. de HERNANDEZ WAS UNREASONABLE

A routine border search will of necessity involve a brief temporary detention incident thereto.<sup>31</sup> The "reasonableness" of a more prolonged detention will require a balancing of the interests of the government against the rights of the individual. As the intrusiveness of the particular police procedure under review increases, the amount of suspicion necessary to justify the intrusion correspondingly increases. This approach balances the privacy interests of the international traveler against the government's interest in preventing the introduction of contraband at the border.<sup>32</sup>

Petitioner contends that in doing this balancing, the Court should apply a "relaxed standard" of reasonableness in assessing government action in the border context.<sup>33</sup> Application of such a standard in cases involving more intrusive border

<sup>29</sup> In so doing, the Ninth Circuit is following this Court's example in *United States v. Cortez*, 449 U.S. 411, 418 (1981).

<sup>30</sup> The number of body cavity searches of suspected drug smugglers that have been upheld by the Ninth Circuit, using the "clear indication" standard, is enlightening. See, e.g., *United States v. Shreve*, 697 F.2d 873 (9th Cir. 1983); *United States v. Couch*, 688 F.2d 599 (9th Cir. 1982); *United States v. Ek*, 676 F.2d 379 (9th Cir. 1982); *United States v. Purvis*, 632 F.2d 94 (9th Cir. 1980); *Aman*, 624 F.2d 911; *United States v. Erwin*, 625 F.2d 838 (9th Cir. 1980); *United States v. Mastberg*, 503 F.2d 465 (9th Cir. 1974). But cf. *Quintero-Castro*, 705 F.2d 1099 (the facts of *Quintero-Castro*, however, would not have supported an x-ray search even under the "flexible" reasonable suspicion standard employed by the Fifth and Eleventh Circuits. See *Mendez-Jimenez*, 709 F.2d at 1304).

<sup>31</sup> *United States v. Espericueta-Reyes*, 631 F.2d 616, 621-22 (9th Cir. 1980).

<sup>32</sup> See *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967).

<sup>33</sup> Br. for Pet. 10, 14, 20.

searches and seizures, such as the one now before the Court, is unprecedented, even in the Fifth and Eleventh Circuits, where a "flexible standard" of reasonable suspicion is employed.<sup>34</sup>

The "relaxed standard" of reasonableness petitioner proposes is already reflected in the "border search exception," which itself excuses law enforcement officers from the normal warrant and probable cause requirements of the Fourth Amendment, and subjects travelers crossing the border to routine searches and seizures. More intrusive searches and seizures, as previously noted, implicate important and fundamental human values, and therefore the reasonableness standard<sup>35</sup> developed by this Court in non-border cases involving detentions based upon suspicion less than probable cause applies.<sup>36</sup>

### A. The Detention Of Ms. de Hernandez Was More Intrusive Than A Full Custodial Arrest.

Sixteen hours of *incommunicado* involuntary confinement is not a minimal invasion of one's dignity and privacy.<sup>37</sup> Although petitioner contends that the detention in this case was

<sup>34</sup> See pages 13-14, *supra*.

<sup>35</sup> As this Court recently stated: "... the underlying command of the Fourth Amendment is always that searches and seizures be reasonable. . . ." *New Jersey v. T.L.O.*, \_\_\_ U.S. \_\_\_ (1985), 36 Crim.L. Rep. (BNA) 3091, 3094.

<sup>36</sup> See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *Brignoni-Ponce*, 422 U.S. 873 (1975); *Martinez-Fuerte*, 428 U.S. 543; *United States v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Place*, \_\_\_ U.S. \_\_\_ (1983), 33 Crim.L. Rep. (BNA) 3186; *T.L.O.*, \_\_\_ U.S. \_\_\_ (1985), 36 Crim.L. Rep. (BNA) 3091; *Hayes v. Florida*, No. 83-6766 (Mar. 20, 1985); *United States v. Sharpe*, No. 83-529 (Mar. 20, 1985); *Winston v. Lee*, No. 83-1334 (Mar. 20, 1985).

<sup>37</sup> This Court has recognized the fundamental nature of "every man's constitutional right to liberty," *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975), and has been particularly sensitive to *incommunicado* involuntary police detentions. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

no more intrusive than a strip search,<sup>38</sup> respondent submits that, under the facts of this case, the intrusiveness of this detention exceeded the intrusiveness of a full-scale custodial arrest.

Had Ms. de Hernandez been arrested, she would at least have been allowed the solace of a telephone call to a family member, a friend, a loved one, or a lawyer. Had she been arrested, after routine processing at the police station, she would have been assigned to a cell where she would have been able to lie down on a bed with a mattress. She would not have been required to sit upright in an office chair under constant observation by strangers.<sup>39</sup> Had she been arrested, she would have been entitled to be taken without unnecessary delay

<sup>38</sup> Pet. 14-16, Br. for Pet. 11, 19, 24-25, 26, 31, 34 ("relatively minor intrusion"). This is petitioner's most fundamental contention. Petitioner agrees that the question presented for this Court is the lawfulness of the detention (Br. for Pet. I). Petitioner argues that it was reasonable to detain Ms. de Hernandez for the period of time she was detained. The lower court should be reversed, petitioner argues, because that court required a higher level of suspicion for the detention than was necessary under the circumstances. A lower standard of suspicion is warranted, petitioner contends, because "such an imposition does not differ significantly from a strip search." (Pet. 16, Br. for Pet. 11).

Petitioner avoids squarely addressing the reasonableness of the detention in this case by focusing attention on the search of Ms. de Hernandez' bodily waste ("... the inspection of a suspect's body wastes does not involve an intrusion ... and does not threaten harm or pain ...") Br. for Pet. 25. Respondent submits that this case is not about the inspection of excrement.

<sup>39</sup> The Court has recognized the enormous toll that psychological as well as physical stress takes on the human spirit in connection with involuntary police detentions. *Leyra v. Denno*, 347 U.S. 556 (1954).

And it is our humanity, as well as the contents of our pockets, that the Fourth Amendment protects:

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his inalienable right of personal security, personal liberty and private

before the nearest federal magistrate,<sup>40</sup> where she would have been advised by a neutral and independent judicial officer of the charges against her, where an attorney would have been appointed for her if she could not afford to retain one, and where the question of bail would have been addressed.

Extended involuntary *incommunicado* detentions "for investigation" are the hallmark of a police state, not a free society. Such detentions have been condemned by this Court. *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969).<sup>41</sup> Although this Court did permit the detention of a person for the length of time necessary to complete a search in *Michigan v. Summers*, 452 U.S. 692 (1981),<sup>42</sup> a critical fact distinguishes the two cases. In *Davis*, during the detention, incriminating evidence was obtained from the suspect himself, whereas, in *Summers*, although evidence was obtained during the period of the detention, the evidence obtained was not a product of the detention. In *Summers*, this Court was careful to point out that "... the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more informa-

property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of [the Fourth Amendment's protections]. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>40</sup> Rule 5, Federal Rules of Criminal Procedure; see 18 U.S.C. § 3501(c); *McNabb v. United States*, 318 U.S. 332, 342 (1942); *Mallory v. United States*, 354 U.S. 449, 451-52 (1957); *United States v. Jernigan*, 582 F.2d 1211, 1213 (9th Cir. 1978); *United States v. Sotoj-Lopez*, 603 F.2d 789, 790-91 (9th Cir. 1979) (government claim that an alien arrested and detained pending a determination of deportability has no Rule 5 rights. Conviction reversed).

<sup>41</sup> *Davis* involved the seizure, transportation and involuntary detention of a suspect for the purpose of obtaining his fingerprints. This Court reversed the resulting conviction, holding that the detention violated the suspect's Fourth Amendment rights. See also *Hayes v. Florida*, No. 83-6766, (Mar. 20, 1985).

<sup>42</sup> *Summers* involved a "routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant." 452 U.S. at 705 n.21.

tion, because the information the officers seek normally will be obtained through the search and not through the detention." *Id.* at 701. The Court also noted that "... special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, ..." *Id.* at 705 n.21.

#### B. The Purpose Of The Detention Was To Gather Incriminating Evidence

Although Ms. de Hernandez was actually detained for more than 27 hours before she was formally arrested,<sup>43</sup> the opinion of the Ninth Circuit Court of Appeals in this case focused on the first 16 hours of that period.<sup>44</sup> In scrutinizing the length of the detention, the Ninth Circuit excluded as presumptively "reasonable" the period of time between the point at which the customs officers first began good faith efforts to obtain a court order, and the time the procedure ordered was accomplished.<sup>45</sup> This was consistent with the Ninth Circuit's judicially developed rule preferring court orders<sup>46</sup> for the most intrusive searches at the border.

The Ninth Circuit has permitted lengthy and intrusive detentions in border search cases involving suspected drug

<sup>43</sup> Respondent maintains that Ms. de Hernandez' detention matured into a *de facto* full custodial arrest during the 16 hour detention after the first strip search showed no evidence of contraband.

<sup>44</sup> Agent Windes testified that he took no positive steps to obtain a court order until 4:00 p.m. on March 5. J.A. 23.

<sup>45</sup> This was a period of approximately eleven hours. J.A. 40, 51.

<sup>46</sup> Although no authority may be derived for such orders from a reading of the Fourth Amendment, United States District Courts have broad powers under the All Writs Act, 28 U.S.C. § 1651, to issue such orders. See, e.g., *United States v. New York Telephone Company*, 434 U.S. 159, 168-174 (1977).

Respondent submits that a court order should be a mandatory prerequisite for x-ray searches for the reasons set forth in n. 50, *infra*.

smugglers,<sup>47</sup> but only when the detention has been incidental to a legitimate police purpose consistent with the Fourth Amendment's protection of the individual, and was not for the purpose of eliciting further incriminating information from the person detained.

What made the police tactics so egregious in *Dunaway v. New York*, 442 U.S. 200 (1979), was not the seizure or the asportation or the length of the detention, but the fact that the police seized an individual they had no cause to arrest for purposes of further investigation.<sup>48</sup> It is this element of improper police motive that is also present in the case *sub judice*. As the court below correctly noted, the agents, not having a sufficient factual basis to obtain a court order for an x-ray examination after the first strip search failed to produce evidence of contraband, decided "to wait for nature to provide the stronger evidence that would support an order."<sup>49</sup>

<sup>47</sup> *United States v. Faherty*, 692 F.2d 1258, 1260 (9th Cir. 1982) (six hours); *Couch*, 688 F.2d at 604 (seven and one-half hours); *Ek*, 676 F.2d at 381 (ten to twelve hours); *Espericueta-Reyes*, 631 F.2d at 621-22 (fifty minute detention approved in extended border search where period of time was deemed incidental to returning suspects to the border for further inquiry. *Id.* at 619, 622); *Erwin*, 625 F.2d at 841 (seven hours).

<sup>48</sup> In *Dunaway*, "further investigation" involved interrogation of the suspect. Police officers in that case picked up a suspect they did not have probable cause to arrest, drove him to police headquarters, and questioned him about his involvement in a crime. The suspect eventually made statements incriminating himself in the crime. This Court reversed the resulting conviction. *Id.* at 219.

<sup>49</sup> Pet. App. 4a. This conclusion by the court below is amply supported by the facts in the record, and also by simple logic and common sense. The evidence indicates that the customs officers who interviewed Ms. de Hernandez at the secondary inspection area asked their superiors to apply to the court for a court-ordered x-ray at that time. Their superiors declined to do so. Yet, sixteen hours later, after a lengthy detention had elicited incriminating evidence from Ms. de Hernandez, the same superiors then applied for and obtained a court order. "The application for the court order contained information gleaned during the 16 hour detention ..." Pet. App. 3a-4a.

Following the example of *Dunaway*, and making ample allowances for the needs of law enforcement officers at the border, the Ninth Circuit has established a rule of reason which evaluates the length of the detention in light of the purposes to which the law enforcement officers put the time during which the suspect is detained. Since the Ninth Circuit has established a strong preference for court orders for the most intrusive searches at the border,<sup>30</sup> lengthy periods of detention are upheld as "reasonable" provided that customs agents are using the time in a good faith effort to obtain a court order. *Erwin*, 625 F.2d at 841; *Ek*, 676 F.2d at 382, 383 n.5; *Faherty*, 692 F.2d at 1260; *Couch*, 688 F.2d at 602 ("... the purpose of the detention [here] was to secure a warrant, not to elicit information.")

<sup>30</sup> The Ninth Circuit rule, which holds that a warrant is merely one factor to be considered in determining the reasonableness of the search, is sound policy, and is firmly grounded in common sense based upon practical experience. Violence is not unknown to the history of customs officers' attempts to perform intrusive body searches upon reluctant, frightened and even criminal travelers at the border. See, e.g., *Blackford*, 247 F.2d 745; *Rivas*, 368 F.2d 703.

The Ninth Circuit's preference for court orders may be traced to *Cameron*, 538 F.2d 254. The facts in *Cameron* demonstrate the potential for violence in this area of the law. See 538 F.2d at 255-57.

The *Cameron* court noted that a court order has the following benefits: a neutral and independent judicial officer can review the facts allegedly justifying the search, and can assist in assuring that it is conducted in a reasonable manner; a court order serves to dispel the apprehensions of the traveler who may be frightened, who may fear that the procedures are not totally lawful, or who may be concerned that he or she is being singled out at the customs officer's whim; it advises the suspect that authorization for the search has been obtained from a judicial officer, and hence is presumptively lawful; it defines the scope of the search so that the suspect will know exactly what procedures he or she faces. Finally, and most importantly, a court order serving these purposes may well secure the cooperation of an otherwise reluctant suspect. *Id.* at 259. (See, e.g., *Aman*, 624 F.2d at 913; *Illinois v. Gates*, 462 U.S. 213, 236 (1983). See also *Breithaupt v. Abram*, 352 U.S. 432, 441, 443 (1957) (Warren, C.J., and Douglas, J., dissenting separately) (pointing out that, under the majority's opinion, the result would have been different if the suspect had been conscious and had physically resisted the taking of his blood.)

The initial 16 hours of Ms. de Hernandez' detention, by contrast, had no other purpose than to produce incriminating evidence lacking at the outset. The circumstances of the detention<sup>51</sup> negate any argument that the customs agents were merely holding her pending the next available flight back to Colombia. A detention, like a search, may not be justified by what it turns up.<sup>52</sup>

The rule of reason established by the Ninth Circuit for the prolonged detention of suspected body cavity smugglers strikes an appropriate balance between the rights of the individual and the interests of the state. Respondent urges this Court to adopt the Ninth Circuit's rule and apply it to the facts of the case at bar.

Petitioner disagrees, and proposes a different rule:

... the propriety of the detention should turn on the lawfulness of the search that necessitates the detention.

Br. for Pet. 11.

Petitioner puts the matter exactly backwards. In fact, the lawfulness of the search often turns on the propriety of the manner in which it is carried out.<sup>53</sup>

Petitioner contends that a person suspected of internal body smuggling at the border may be detained for whatever period of time is necessary to complete the search.<sup>54</sup> While admirable

<sup>51</sup> Constant visual surveillance, and the imposed requirement, should Ms. de Hernandez desire to move her bowels, that she excrete while under observation into a wastebasket instead of privately into a toilet. See page 6, *supra*. See also page 21 and n.49, *supra*.

<sup>52</sup> See *United States v. Di Re*, 332 U.S. 581, 595 (1948).

<sup>53</sup>

As we observed in *Terry*, [392 U.S. 1] "[t]he manner in which the seizure ... [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all."

*Place*, \_\_\_ U.S. \_\_\_ (1983), 33 Crim.L.Rep. (BNA) at 3189; *Kremen v. United States*, 353 U.S. 346 (1957).

<sup>54</sup> Petitioner's brief continually returns to the same theme. See Br. for Pet., 20-21, 24 n.20, 26-27 ("[I]t is ordinarily permissible to detain a person for the length of time reasonably necessary to perform a lawful search, . . .")

in its simplicity, this argument totally fails to consider that this Court has repeatedly held that a seizure reasonable at its inception may become unreasonable because of the length of the subsequent detention.<sup>55</sup> Furthermore, the adoption by the Court of the rule suggested by petitioner would leave the severity of the intrusion in border searches totally within the unfettered discretion of the law enforcement officer.<sup>56</sup>

### C. Ms. de Hernandez Did Not Consent To Be Detained

Petitioner argues that this was not an unreasonably intrusive or prolonged detention subject to the unconstrained

<sup>55</sup> See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983), where a suspect who fit the "drug courier profile" was detained at airport for 15 minutes on agents' suspicion he was carrying narcotics. After brief initial questioning showed suspect to be traveling under an assumed name, the agents, still in possession of suspect's tickets and driver's license, asked suspect to accompany them to a small room for further investigation. Agents retrieved suspect's baggage, which was found to contain marijuana.

This Court, affirming reversal of the resulting conviction, and agreeing that a reasonable suspicion justified a seizure and temporary detention of the person, held that "[w]hat had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions." *Id.* at 503.

\* \* \*

"... [T]he police [may not] seek to verify their suspicions by means that approach the conditions of arrest." *Id.* at 499.

In so holding, the Court emphasized that:

"It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.* at 500. (Emphasis added). See also *Place*, \_\_\_ U.S. \_\_\_ (1983), 33 Crim.L.Rep. (BNA) at 3189. (90 minute airport detention on reasonable suspicion that luggage contained narcotics, held unreasonable. "The length of the detention ... alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." *Id.*).

<sup>56</sup> See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979) (police officers making random stops of automobiles on the highway for license and registration

discretion of the customs officers because Ms. de Hernandez, not the government, controlled the length of her detention.<sup>57</sup> Petitioner further contends that:

... a suspect cannot complain of the intrusiveness of the detention if he selected detention over the alternative of an x-ray search.

Br. for Pet. 28. These arguments fail to withstand closer examination.

Petitioner's statements contain a dual implication: first, that by choosing between two alternatives, Ms. de Hernandez somehow "consented" to what happened to her, and second, that she had the key to her release in her own pocket. By failing to use it, petitioner argues, she cannot later "complain."

Ms. de Hernandez was offered two alternatives: 1) an x-ray examination, or 2) involuntary confinement for an indefinite period until she excreted bodily waste. For a woman who

checks; conviction reversed. "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the [law enforcement] official in the field be circumscribed, at least to some extent." *Id.* at 661; *Brown v. Texas*, 443 U.S. 47 (1979).

Because the "border search exception" relieves law enforcement officers of the need to have either a warrant or probable cause, it is particularly important that courts establish concrete, identifiable standards which restrain law enforcement officers from invading the most sacrosanct areas of a traveler's privacy at whim. Although we can assume that most law enforcement officers are decent and honorable persons, they are all nevertheless "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), and in their zealous pursuit of this objective can be expected to strain against the harness imposed by the Fourth Amendment.

<sup>57</sup> Br. for Pet. 11, 27, 28-30.

stated she was four weeks pregnant,<sup>58</sup> the "choice" could well be described as: sixteen hours of torture or a dose of poison.<sup>59</sup>

<sup>58</sup> We now know that Ms. de Hernandez was not only lying, she was attempting to smuggle narcotics. It is tempting, in retrospect, to view the choices confronting Ms. de Hernandez, and to do the requisite balancing of interests in determining the reasonableness of the police conduct, with an eye toward preventing the release of a clearly guilty felon, and making certain that a single criminal gets her just deserts.

The problem with adopting this point of view is that Fourth Amendment cases simply do not reach this Court with innocent defendants in tow. Since the Fourth Amendment standards established here will be applied to the innocent and guilty alike, it would seem to serve no useful purpose to examine Ms. de Hernandez' "choices" or establish Fourth Amendment standards of "reasonableness" on the basis of her subsequently discovered guilt.

If all suspects were guilty, there would be no need for the Bill of Rights at all. The facts, regrettably, show that this is not true. (See page 38 and n.88, *infra.*)

Respondent reads with pain petitioner's statement that "[w]e have little doubt that most innocent travelers . . . would elect a prompt x-ray as the means of dispelling suspicion and gaining entry into the country." Br. for Pet. 28. The clear implication of petitioner's statement is that only a guilty person would refuse to consent to an x-ray. Although petitioner stops short of saying Ms. de Hernandez' refusal to consent created additional suspicion thus justifying further detention, it is nevertheless a sad day when the Solicitor General takes the position before this Court that only the guilty would object to intrusions on their privacy and dignity.

One need not be guilty to claim the protections of the Bill of Rights. And claiming those protections is no evidence of a guilty mind. See *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (exercise of Fifth Amendment privilege to remain silent is "insolubly ambiguous" and cannot be commented on by the prosecutor as being evidence of guilt.)

<sup>59</sup> This is neither exaggerated nor melodramatic. The following passage is taken verbatim from *Vega-Barvo*, 729 F.2d at 1348, a case decided recently in the circuit petitioner considers to be the repository of enlightened jurisprudence in the area of border searches:

Several weeks after she was x-rayed, Vega-Barvo discovered she was pregnant. Not knowing this fact at the time of the x-ray, she had answered no to the doctor's inquiry on this matter. Since the question was asked, it must be assumed the x-ray would not have been conducted

This, as the court below accurately characterized it, was nothing more than a Hobson's choice.<sup>60</sup>

When a traveler crossing the border is offered two intrusive and offensive choices, both of which are substantial invasions of her personal privacy and dignity, nothing in logic or common sense decrees that when she "selects" the less objectionable, by doing so, she is later disqualified from complaining that the one she opted for violated her rights. If petitioner's claims were in fact true, the police could effectively close the courthouse door to complaints of Fourth Amendment violations simply by offering every suspect two choices, one of which would be so painful or outrageously intrusive that the other would pale by comparison. "Choice" of the lesser of the two evils would thereafter preclude a complaint about either. Fourth Amendment violations could be preserved only by those who acted against their enlightened self-interest by submitting to unbearable tortures. Therefore, petitioner's arguments on this point make no logical or legal sense.<sup>61</sup>

There is a way in which a traveler's choice of one intrusive option instead of another could have a bearing on the reasonableness of the search or seizure.

if the doctors knew she was pregnant. When she readvised the same doctors of her condition, they suggested she abort the fetus because it may have been damaged by the x-rays. She followed the doctor's advice.

Despite these *unfortunate circumstances*, there is insufficient record evidence of the normal medical dangers of x-rays to support a conclusion that an x-ray search is more intrusive than a strip-search. (Emphasis added).

<sup>60</sup> Pet. App. 5a; Thomas Hobson, *circa*, 1631; English liveryman who required every customer to take the horse nearest the door: an apparently free choice when there is no real alternative. *Webster's Ninth New Collegiate Dictionary*, 1984; See *Simmons v. United States*, 390 U.S. 377, 391-94 (1968).

<sup>61</sup> The dissenting judge in the court below may have been the inspiration for petitioner's contentions, when he stated: ". . . though de Hernandez may have suffered 'many hours of humiliating discomfort,' she was herself solely responsible for a considerable part of it." Pet. App. 9a.

Consider the following problem:

Suppose X crosses the border. A customs agent develops a level of suspicion concerning X that will justify a strip search, but will not justify a body cavity search. The customs agent offers X the option of submitting to either one. If X chooses the lesser of the intrusive options, and later complains that his Fourth Amendment rights were violated, the reasonableness of the search will, of course, be judged by whether the officer had a level of suspicion sufficient to justify that option. If X chooses the *more* intrusive option, however, the reasonableness of the search will still be judged by whether the *lesser* of the intrusive options was justified. The fact that X chose the more intrusive option cannot deprive the government of the fruits of the search to which it was legally entitled.

The hypothetical situation may or may not have significance for the case at bar. If, and only if, an x-ray search would have been less intrusive than the sixteen hour involuntary confinement that Ms. de Hernandez suffered,<sup>62</sup> then the fact that she refused the x-ray and opted for the detention becomes important, because the Court can weigh the level of suspicion possessed by the customs inspectors against the less intrusive option she refused in deciding whether the conduct of the customs agents was reasonable under the circumstances.<sup>63</sup>

The intrusiveness of x-ray examinations has been addressed by the circuit courts of appeal. There is a split in the circuits on

<sup>62</sup> Petitioner steadfastly maintains throughout his brief that the detention Ms. de Hernandez endured in this case, an x-ray search, and a strip search are all *equally* intrusive. ("an x-ray search involves an invasion of privacy no greater than that attendant to a strip search: . . ." Br. for Pet. 28; ". . . the quantum of suspicion required to conduct a strip search is all that is required to permit a detention of the type at issue in this case." *Id.* at 31, 11, 24-25, 26, 28, 34; "a reasonable suspicion of alimentary canal smuggling is sufficient to justify an x-ray search as well as detention." *Id.* at 28.

<sup>63</sup> Assuming, *arguendo*, that an x-ray search is less intrusive than prolonged involuntary confinement of the type suffered by Ms. de Hernandez, there is much to be said for this reasoning. The Eleventh Circuit, having

the issue. The Ninth Circuit has determined that x-ray searches are as intrusive as body cavity searches and require a comparable level of suspicion to justify their initiation.<sup>64</sup> The Eleventh Circuit has determined that x-ray searches are no more intrusive than strip searches and require a comparable level of suspicion to justify their initiation.<sup>65</sup> Both circuits agree, however, that the intrusiveness of an x-ray examination is directly related to the medical dangers incident thereto.<sup>66</sup>

This Court is not in a position to make an authoritative disposition of that particular issue, however, because there is

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decided in *Vega-Barvo*, 729 F.2d 1341, that x-ray searches are no more intrusive than strip searches, addressed this very issue in *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984).

Petitioner cites *Mosquera-Ramirez* for the proposition that the type of detention procedure employed here is no more intrusive than an x-ray search. Br. for Pet. 19. The facts of that case reveal that Mosquera-Ramirez' articulably suspicious behavior (*see* page 40, *infra*) caused customs agents to reasonably suspect him of smuggling narcotics internally as he crossed the border. He refused to consent to an x-ray. No court order was sought (nor is one recognized in the Eleventh Circuit). Mosquera-Ramirez was detained at a local hospital for twelve hours until he began excreting cocaine-filled condoms, at which point he was arrested.

Contrary to petitioner's contention, the Eleventh Circuit in *Mosquera-Ramirez* implicitly recognized that the ordeal that Mosquera-Ramirez endured in a twelve hour involuntary detention was more intrusive than an x-ray, but also realistically acknowledged that forcing an x-ray examination on an unconsenting or resisting suspect is not feasible. *Id.* at 1356.

<sup>64</sup> *Ek*, 676 F.2d at 382.

<sup>65</sup> *Vega-Barvo*, 729 F.2d at 1348-49.

<sup>66</sup> "Vega-Barvo argues . . . that despite the x-ray's inoffensive nature, its medical dangers control the intrusiveness issue. It must be conceded without need for analysis that as medical danger increases because of a search procedure, so must the reasons for conducting the procedure." *Id.* at 1348.

"We hold that the stricter standard required for a body cavity search also applies to an x-ray search. An x-ray search, although perhaps not so humiliating as a strip search, nevertheless is more intrusive since the search is potentially harmful to the health of the suspect." *Ek*, 676 F.2d at 382 (footnote omitted).

not a scintilla of evidence in this record on the question, nor was it briefed or argued in either court below.<sup>67</sup>

Given the current state of the record in this case, the Court has two options. First, the Court could assume, as petitioner urges,<sup>68</sup> and without deciding the question, that the intrusiveness of Ms. de Hernandez' detention was equal to the intrusiveness of an x-ray examination. With that assumption, issues involving the intrusiveness of x-ray searches disappear and the Court is free to squarely confront and assess the reasonableness of the detention in this case. Adopting this course of action would effectively negate the significance of the option not pursued here by Ms. de Hernandez (consent to an x-ray examination), and would confine the decision in this case to the facts in the record before the Court.

<sup>67</sup> Petitioner's brief on the merits repeatedly invites the Court to incorporate by reference petitioner's brief in opposition to petition for a writ of certiorari in *Vega-Barvo*, 729 F.2d 1341, *cert. denied*, \_\_\_ U.S. \_\_\_, 36 Crim. L. Rep. (BNA) 4133 (Dec. 10, 1984). Br. for Pet. 19 n.13, 26 n.21, 28, 31 n.27).

That brief, provided to respondent by petitioner, contains factual information concerning the medical dangers posed by routine abdominal x-rays, including quotations from and citations to medical journals and expert medical authorities.

Petitioner asks this Court to take that brief into consideration in evaluating the intrusiveness of x-ray examinations in this case ("x-ray examinations . . . are not viewed as a health hazard by either the public or the medical profession. See our brief in opposition in *Vega-Barvo v. United States*, *supra*, at 7-11.") Br. for Pet. 28.

Respondent has grave concerns about the propriety of the procedure petitioner invites this Court to pursue. Petitioner's *Vega-Barvo* brief contains evidence which pertains to an issue raised by petitioner in his brief in this case, on which there is no evidence whatsoever in the record now before the Court. The upshot of petitioner's action is to provide this Court with factual information which is outside the record, which was not considered by either court below and which pertains directly to an issue petitioner raises for the first time in his brief to this Court.

<sup>68</sup> See page 28 n. 62, *supra*.

The second option open to the Court assumes that the Court wishes to reach out and make an authoritative nationwide determination on the intrusiveness of x-ray examinations, based upon an evaluation of the medical dangers posed by exposing humans to x-ray radiation. Respondent respectfully submits that if the Court is determined to follow this course of action, the Court must remand this case to the district court from whence it came where evidence can be taken, and where both sides will have a full and fair opportunity to develop the record on that question.

#### D. Ms. de Hernandez Was Entitled To The Same Fourth Amendment Rights As A Returning Citizen<sup>69</sup>

##### 1. Aliens And Immigration Procedures

Petitioner makes the following argument: immigration laws provide that an alien seeking admission to this country may be excluded on a variety of grounds, and may lawfully be detained for further inquiry pending a decision on whether the alien may enter. As a result of the "general awareness" of such procedures, an alien seeking to enter has a "drastically limited" reasonable expectation of privacy and liberty at the border.<sup>70</sup> Because an alien's expectation of privacy is less, the intrusiveness of the search or seizure is less, which in turn lowers the quantum of suspicion necessary to sustain the search or seizure as "reasonable under the circumstances." Therefore, petitioner argues, Ms. de Hernandez' lengthy involuntary confinement was not unreasonably intrusive under the circumstances because she was an alien.<sup>71</sup>

<sup>69</sup> This issue was not raised, briefed or addressed by either party or either court below. Both courts below appear to have assumed that Ms. de Hernandez had the same Fourth Amendment rights as a returning citizen. Nevertheless, respondent agrees with petitioner that it is an issue that is fairly presented by the facts and record in this case.

<sup>70</sup> Br. for Pet. 35.

<sup>71</sup> Br. for Pet. 12, 24, 34-37.

Whatever the merits of petitioner's argument may be in the abstract, it has no applicability whatsoever to the facts of this case. Ms. de Hernandez was undeniably and incontrovertibly admitted to this country by immigration officers at the immigration checkpoint.<sup>72</sup> As an admitted alien, whether she was here on a temporary visa or a work permit,<sup>73</sup> she was entitled to the same expectation of privacy and the same Fourth Amendment rights as a citizen. While the fact of alienage may have relevance to an individual's reasonable expectation of privacy during immigration procedures, it has no relevance once those procedures are completed and the individual is admitted. Customs inspections, on the other hand, have an equal impact on the reasonable expectation of privacy of aliens and citizens alike.<sup>74</sup>

## 2. Aliens And The Criminal Sanction

This Court has never decided whether aliens suspected of criminal activity may be given different treatment than citizens at the border. There is no question that a sovereign has the inherent plenary power to exclude aliens completely, for any reason or for no reason at all, and can prescribe the conditions for their entry. *Kleindienst v. Mandel*, 408 U.S. 753, 762, 765-66 (1972).

Moreover, even aliens inside our borders are not entitled to enjoy all the advantages of citizenship, and may be denied the privileges, immunities and benefits to which citizens are entitled. *Matthews v. Diaz*, 426 U.S. 67, 78 n.12, 79-80 (1976).

Although aliens have no constitutional right to enter the country, once admitted, they enjoy the same fundamental

<sup>72</sup> See page 1, *supra*.

<sup>73</sup> *Almeida-Sanchez*, 413 U.S. at 267.

<sup>74</sup> See pages 33-36, *infra*. The only cases cited by petitioner in support of his argument are *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Landon v. Plasencia*, 459 U.S. 21 (1982). Br. for Pet. 35 n.30. Both cases involved immigration exclusion proceedings, and are therefore totally inapposite to the facts of this case.

constitutional rights as citizens. This Court has held that aliens, even those whose presence in the country is unlawful, involuntary or transitory, are entitled to due process of law under the Fifth and Fourteenth Amendments. See *Diaz*, 426 U.S. at 77.<sup>75</sup>

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court held that aliens residing in this country illegally, who are subject to suffer deportation or criminal sanction at any time because of their undocumented status, are nevertheless entitled to a free public education for their children, even though public education is not a Constitutionally guaranteed right. *Id.* at 221. The government in *Doe* argued that although the Fourteenth Amendment forbids the states from depriving "any person within its jurisdiction" of equal protection of the laws, undocumented aliens were not "persons within the jurisdiction" and therefore they had no right to equal protection of the laws. To which this Court responded:

We reject this argument. Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.

*Id.* at 210.

The language of the Fourth Amendment protects "people." When the Framers meant to say "citizens", they did so.<sup>76</sup>

The Equal Protection Clause of the Fourteenth Amendment provides that: "[n]o State shall deprive . . ." and does not, by its terms, inhibit Congress from acting to deprive persons of

<sup>75</sup> An alien who has been admitted, or who is otherwise physically within the country, even illegally, is generally entitled to the greater substantive rights and procedural protections of a deportation hearing. *Plasencia*, 459 U.S. at 25-27; *Mezei*, 345 U.S. at 212.

By contrast, aliens seeking entry at the border have been described as having "no rights" in immigration exclusion proceedings. *Mezei*, 345 U.S. at 221 and n.4.

<sup>76</sup> The Constitution protects the privileges and immunities only of citizens. Fourteenth Amendment, § 1; See Art. IV § 2, cl. 1.

equal protection of the laws. There is no language in the Fifth Amendment guaranteeing persons equal protection of the laws. Nevertheless, this Court has held that while Fourteenth Amendment notions of equal protection are not entirely congruent with Fifth Amendment concepts of due process, invidious discrimination where fundamental rights<sup>77</sup> are involved makes the Equal Protection Clause applicable to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

This Court long ago recognized that the distinction between immigration proceedings and criminal proceedings is a critical one for the rights of the alien. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court considered an Act of Congress which, in an attempt to discourage the influx of illegal aliens, provided that any alien found to be unlawfully in the country "shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States."<sup>78</sup> The Court acknowledged that the right to exclude or expel aliens "is an inherent and inalienable right of every sovereign"<sup>79</sup> and that such power "may be exercised entirely through executive officers" in summary proceedings.<sup>80</sup>

Where the alien is to be subjected to punishment and to the stigma of the criminal sanction, however, *Wong Wing* held that the alien is entitled to those fundamental procedural due proc-

<sup>77</sup> In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court held that the Fourth Amendment's protection against unreasonable searches and seizures is so fundamental to a system of ordered liberty as to be enforceable against the States through the Due Process Clause of the Fourteenth Amendment.

<sup>78</sup> 163 U.S. at 233-34.

<sup>79</sup> *Id.* at 231.

<sup>80</sup> *Id.* at 231, 235-36 (deportation is not punishment for a crime, and detention pending deportation is not imprisonment in the legal sense); See *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979) (pre-trial detention is not punishment).

ess rights guaranteed by the Fifth and Sixth Amendments to the Constitution. *Id.* at 238.

In *Almeida-Sanchez*, 413 U.S. 266, the Court assumed, without deciding, that a Mexican alien in this country on a work permit had the full panoply of Fourth Amendment protections, and proceeded to declare an Act of Congress unconstitutional because of a violation of his Fourth Amendment rights. *Id.* at 273.<sup>81</sup>

The language in *Wong Wing* and *Almeida-Sanchez* has been consistently followed<sup>82</sup> by the Court, and was implicitly reaffirmed by this Court's recent decision in *INS v. Lopez-Mendoza*, \_\_\_ U.S. \_\_\_ (1984), 35 Crim.L.Rep. (BNA) 3310. *Lopez-Mendoza* involved two Mexican nationals who were seized by immigration authorities and held for deportation. The aliens challenged their seizure, claiming that it violated their Fourth Amendment rights. The Ninth Circuit Court of Appeals ruled that both had been seized in violation of their Fourth Amendment rights, and as to Sandoval, held that information obtained as a result of his seizure should be suppressed. This Court reversed the Ninth Circuit's ruling suppressing the evidence and held that the exclusionary rule of the Fourth Amendment does not apply to immigration proceedings:

<sup>81</sup> See *United States v. Villamonte-Marquez*, \_\_\_ U.S. \_\_\_ (1983), 33 Crim.L.Rep. (BNA) 3173, 3175-76.

<sup>82</sup> Cf. *Carlson v. Landon*, 342 U.S. 524, 537, 544-45 (1952) (the Eighth Amendment's guarantee of reasonable bail in criminal proceedings is inapplicable in the context of deportation hearings, which are civil in nature.)

In *Plasencia*, 459 U.S. 21, although *Plasencia* had allegedly committed a crime in the process of attempting to enter the United States, she was apparently never arrested or charged with a crime. Instead, she was treated as "excludable" under the applicable immigration statute and regulations. Thus, the proceedings against her that eventuated in this Court were civil in nature and the question of what rights she may have had as a criminal defendant never arose.

A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, . . . .

\* \* \*

A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding various protections that apply in the context of a criminal trial do not apply in a deportation hearing.

*Id.* at 3312.

In so ruling, the Court again assumed without deciding that the Mexican aliens involved had the same Fourth Amendment rights as citizens:

We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez or Sandoval. . . . Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.<sup>83</sup>

*Id.* at 3316.

Therefore, petitioner's contention to the contrary notwithstanding, under the facts of this case, aliens must be given equal Fourth Amendment protection.<sup>84</sup>

<sup>83</sup> Determining the scope of Ms. de Hernandez' Fourth Amendment rights would be complicated considerably in the present case if evidence of drug smuggling activity had been discovered by immigration officers during the course of her examination and inspection pursuant to routine immigration procedures. If that had been the case, this Court would be faced with the prospect of attempting to unravel the difficult question of whether the immigration officers had been acting primarily for immigration purposes, or pursuant to a criminal investigation. Cf. *United States v. Goureaux*, \_\_\_ U.S. \_\_\_ (1984), 35 Crim.L.Rep. (BNA) 3091; *Michigan v. Clifford*, \_\_\_ U.S. \_\_\_ (1984), 34 Crim.L.Rep. (BNA) 3007. Fortunately, that issue is not before the Court in this case.

<sup>84</sup> A decision by this Court that aliens are entitled to fewer rights than citizens in criminal proceedings would be met with considerable interest in

### E. If Approved, The Police Procedure Employed Here Would Have A Disproportionate Impact Upon Innocent Travelers

Because aliens and citizens must be given equal Fourth Amendment protection under the facts of this case, this Court's *imprimatur* on the kind of procedures employed in the case at bar would have serious consequences for all international travelers—not just alien drug smugglers. It is important to note that the law enforcement agency involved here is the United States Customs Service; not the Immigration and Naturalization Service. Ms. de Hernandez had successfully passed through the immigration checkpoint at the time she first encountered the customs inspector. At the immigration checkpoint, her visa and travel documents were found to be in order and her passport was stamped "admitted."<sup>85</sup> She then proceeded to a customs inspection area where she stood in line, presumably with American citizens also awaiting customs inspection and clearance. The rule the Court fashions today as "reasonable" will apply

. . . not only to poor and illiterate foreigners, but also . . . to everyone crossing the border, including United States citizens returning to this country.<sup>86</sup>

*Vega-Barvo*, 729 F.2d at 1351 (dissenting opinion).

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the foreign capitals of the world as well as within our own Department of State. Americans are aliens when they travel abroad, and it is not inconceivable that those countries whose citizens receive harsh treatment at the hands of our criminal justice system would reciprocate.

<sup>85</sup> See page 1, *supra*.

<sup>86</sup> Petitioner may respond that since the airport drug courier profile specifies that the characteristics of a drug smuggler include having no friends or family in the United States and speaking no English, the chances of American citizens becoming enmeshed in the procedures employed here are remote. There are two answers to such a response:

First, if criminals are as clever and cunning as petitioner gives them credit for being, they will quickly realize that aliens are prime suspects for body cavity or x-ray searches under the airport drug courier profiles currently in use. It will not be long before the kingpins of the international drug trade

The impact of the proposed police procedure upon innocent persons should be weighed in the balance of "reasonableness." This Court's decision will affect the thousands of people who cross our borders every day.<sup>87</sup> Moreover, the available statistics indicate that law enforcement officers at the border sweep the innocent in with the guilty for highly intrusive strip and body cavity searches with considerable regularity.<sup>88</sup>

begin recruiting unfortunate Americans who are desperate for money to serve as their mules. *See, e.g., Blackford*, 247 F.2d 745. The airport drug courier profiles would then presumably be altered to reflect this "new trend."

Second, petitioner's response fails to consider the many innocent aliens who may be subject to the same treatment Ms. de Hernandez received. Although these persons are not citizens, the vast majority of them do not carry drugs, and they come to our shores believing that this country has a judicial system second to none in its concern for common decency and in its respect for the rights of the individual. Moreover, once they are here, aliens have the same fundamental Fourth Amendment rights as United States citizens. (*See* pages 31-36, *supra*.)

<sup>87</sup> "Along [the Mexican-American border alone] there were 152 million legal entries at authorized ports of entry during fiscal 1972, of which 91 million were made by aliens." *United States v. Ortiz*, 422 U.S. 891, 905 (1975) (App., concurring opinion, Burger, C.J.).

"We can . . . take judicial notice that many thousands of women crossed the border during the same period, and that the vast majority were not carrying narcotics in their body cavities or elsewhere." *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967).

<sup>88</sup> ". . . between February and September, 1968, customs officials at Calexico conducted 331 strip searches of which only 96 [29%] led to the recovery of contraband." *Guadalupe-Garza*, 421 F.2d at 879 n.2.

"In *Henderson* [390 F.2d 805] we said: 'On the other hand the record does not show how many women who crossed the border during the same time were subjected to similar searches as a result of which nothing was found.' In this case we do have such information. Dr. Salerno testified that he had examined the body cavities of some 300 persons during the year before the trial, and had found narcotics in 15 to 20 percent of them. As we said in *Henderson*, the other 80 to 85 percent 'are certainly entitled to their dignity and privacy; their interests, too, are to be weighed.'" *Morales v. United States*, 406 F.2d 1298, 1300 n.2 (9th Cir. 1969).

The frequency with which the particular law enforcement procedure at issue is likely to invade the dignity and privacy of innocent persons is highly relevant to its reasonableness. *Brignoni-Ponce*, 422 U.S. at 883-84.<sup>89</sup>

**F. The Level Of Articulable Suspicion Possessed By The Customs Officers In This Case Would Not Have Justified A Lengthy Detention Under The Standard Employed By Any Circuit Court Of Appeals<sup>90</sup>**

In assessing the reasonableness of the detention in this case, it is instructive to compare the level of suspicion possessed by the customs officers with the articulable suspicion present in comparable Fifth and Eleventh Circuit cases which have upheld x-ray searches or lengthy detentions based upon the "flexible" reasonable suspicion standard employed in those circuits:

1. *Vega-Barvo*, 729 F.2d at 1343, 1350 (11th Cir.) (manifest inconsistencies in explanation of purpose of trip, no business

<sup>89</sup> Mr. Justice Bradley, responding long ago to the argument that general warrants were of "utility" as "a means of detecting offenders by discovering evidence," stated:

. . . our law has provided no [general warrants] to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

*Boyd v. United States*, 116 U.S. at 629 (1886). (Bradley J., quoting Lord Camden).

<sup>90</sup> Petitioner states:

"In neither court below did respondent dispute that the facts known to the Customs officers satisfied the reasonable suspicion standard." Br. for Pet. 38 n.31.

Petitioner is in error. The reporter's transcript of the suppression hearing in the district court reflects the following:

"MS. LEVINE: 'Your Honor, it's my position that there was no clear indication or probable cause or any grounds to hold Ms. de Hernandez when the strip search was negative. I am not conceding there was cause for a strip search, but, since nothing was found, it's not at issue.'" J.A. 34 (Emphasis added).

cards, extreme nervousness, pulsating carotid artery, suitcase contained "rags").

2. *Mosquera-Ramirez*, 729 F.2d at 1354-55 (11th Cir.) (lied about his occupation, could not answer some questions, gave inconclusive answers to other questions, had no credit cards, checks or letters of credit, and insufficient cash to accomplish the alleged purpose of his trip, was unable to explain the inconsistencies, could not give a definite itinerary for his stay, and when confronted with fact that passport showed he had traveled to Miami just two months before, "became very evasive and very nervous").

3. *Pino*, 729 F.2d at 1358 (11th Cir.) (claimed to be on business trip to buy television repair parts, yet was unable to name a single part to be purchased, "no business cards, manuals, forms or other business related accouterments," evasive, "did not know" answers to some questions, unusually nervous and disoriented throughout the inspection).

4. *United States v. Castaneda-Castaneda*, 729 F.2d 1360, 1362, 1363-64 (11th Cir. 1984) (extreme passivity, claimed to be a businessman but "ridiculous" answers to questions about occupation, travel documents incorrectly completed, nervousness, pulsating carotid artery, rough, red hands indicating manual labor in the face of claim of middle or upper-middle class life, airline ticket for New York in the face of claim of intention to vacation at Disneyworld).

5. *United States v. Henao-Castano*, 729 F.2d 1364, 1365-66 (11th Cir. 1984) (claimed that airplane ticket was purchased on May 10 for cash, when face of ticket revealed it was purchased May 25 on credit, claimed to own electronic parts store and to sell televisions, but had no business card, knew names of no stores he planned to visit, and could not answer, or answered incorrectly, even superficial questions about televisions).

6. *United States v. Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984) (claimed to be a businessman but no business cards or other identification, "incongruous," "wildly implausible" story

concerning purpose of visit: a plan to purchase three or four Xerox color photocopying machines with \$971.00 cash, maintained that \$971.00 enough to cover purchase, and related that machines would be transported back with him in a single piece of luggage, had no idea where such machines could be purchased, claimed to have hotel reservations at a particular hotel, which claim was shown to be false).

7. *United States v. De Montoya*, 729 F.2d 1369, 1370-71 (11th Cir. 1984) (lied about her conduct during the flight, claimed to have husband and children, but had no pictures of her family, claimed that husband an engineer but unable to say what kind of engineer, claimed that her suit was new, but unable to button it over bulging stomach, discrepancy between social status claimed and her appearance and poor quality personal effects).

8. *Mejia*, 720 F.2d at 1380 (5th Cir.) (airplane tickets contradicted declared itinerary, claimed to be a businessman on a buying trip, but not dressed as a businessman, no business suits in luggage, no business cards, hands calloused consistent with manual labor).

In the case at bar, none of the articulably suspicious behavior which supported an x-ray search or a lengthy detention in other reported cases was present. There was no evidence here of an inherently incredible story, no evidence of failure to answer questions, no evidence of evasive or nervous behavior, no evidence of lack of a definite itinerary, no admission to giving inaccurate information, or any of the other objective indicia of drug smuggling. There was no evidence of passport or visa tampering, no evidence of possession of anti-diarrhea medication or laxatives,<sup>91</sup> no evidence that Ms. de Hernandez' body movements were restricted or stiff,<sup>92</sup> no evidence of disorientation,<sup>93</sup> no evidence of recent drug use such as glazed or

<sup>91</sup> Compare *Mendez-Jimenez*, 709 F.2d at 1302.

<sup>92</sup> Compare *United States v. Shreve*, 697 F.2d 873, 874 (9th Cir. 1983).

<sup>93</sup> Compare *Pino*, 729 F.2d at 1358.

dilated eyes, needle marks on the arms, or slurred speech,<sup>94</sup> no tip from a confidential informant indicating Ms. de Hernandez would be smuggling drugs into the country,<sup>95</sup> and no evidence from the Customs Bureau computer that Ms. de Hernandez had previously been involved in narcotics smuggling.<sup>96</sup> Instead of being unemployed with a large amount of cash, Ms. de Hernandez presented evidence of being employed, and the cash that she possessed was directly related to the stated purpose of her trip. As the Eleventh Circuit stated in *Vega-Barvo*, 729 F.2d at 1350:

Since swallows follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example, suspicion will not focus on bulky dress, . . . but on the traveler's inability to explain his or her trip.

*Accord, Mosquera-Ramirez*, 729 F.2d at 1354.

Unlike the aforementioned cases, there was nothing unusual in Ms. de Hernandez' papers, responses, conduct, demeanor, appearance or personal possessions which warranted even a reasonable suspicion. Not even the Fifth and Eleventh Circuits permit an x-ray search or a lengthy detention based upon an inarticulate hunch. In the instant case, there were simply no particularized facts which amounted to a reasonable suspicion that Ms. de Hernandez was internally smuggling narcotics. Furthermore, Inspector Serrato's statement that he and another inspector felt that Ms. de Hernandez "fit the profile" of a narcotics smuggler does not turn an inchoate hunch into reasonable suspicion.

. . . what is significant for the reasonable suspicion standard is not the presence of generalized profile characteristics but articulable individualized suspicious behavior.<sup>97</sup>

<sup>94</sup> Compare *Cameron*, 538 F.2d at 255.

<sup>95</sup> Compare *Couch*, 688 F.2d at 600.

<sup>96</sup> Compare *Aman*, 624 F.2d at 912.

<sup>97</sup> *Castaneda-Castaneda*, 729 F.2d at 1363; accord, *Mejia*, 720 F.2d at 1382; *Reid*, 448 U.S. at 440-41; see *Mendenhall*, 446 U.S. at 565 n.6 (concurring opinion of Powell, J.)

As the Ninth Circuit stated in its opinion below, ". . . thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent." Pet. App. 5a.

## CONCLUSION

Vindicating the rights of a guilty criminal defendant is a troublesome proposition for any court at any time, the more so when the winds of popular opinion and Congressional will blow so strongly in another direction.<sup>98</sup>

Thirty-eight years ago, in a far-sighted and prescient<sup>99</sup> dissent in *United States v. Harris*, 331 U.S. 145, 156, 173 (1947), Mr. Justice Frankfurter expressed these thoughts:

If only the fate of the [defendants] were involved, one might be brutally indifferent to the ways by which they get their deserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance.

\* \* \*

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and

<sup>98</sup> See, e.g., the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, 98 Stat. 1837, H.J. Res. 648 (Oct. 12, 1984).

<sup>99</sup> *Harris* was overruled by this Court in *Chimel v. California*, 395 U.S. 752, 768 (1968).

repression for society as a whole. The dangers are not fanciful. We too readily forget them.

For the reasons heretofore stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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## APPENDIX

## **APPENDIX**

### **Constitutional Provisions**

#### **United States Constitution**

##### **Amendment IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

##### **Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, without due process of law; nor shall private property be taken for public use, without just compensation.

##### **Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **Amendment VIII**

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

### **Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Statutory Provisions**

19 U.S.C. § 482 authorizes customs officials to "stop, search, and examine . . . any vehicle, beast, or person, on which or whom . . . they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise. . . ."

19 U.S.C. § 1582 provides, in pertinent part, that "[t]he Secretary of the Treasury may prescribe regulations for the search of persons and baggage . . . ; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations."

### **Rules**

Rule 5, Federal Rules of Criminal Procedure, provides in pertinent part, that "[a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . . ."